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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 12

WILLIAM A. PRICE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

LEONARD B. BOUDIN
25 Broad Street
New York, N. Y.

HARRY I. RAND
1501 Broadway
New York, N. Y.

Counsel for Petitioner

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 138-142) is reported at 280 F. 2d 715. The District Court wrote no opinion.

Jurisdiction

The judgment of the Court of Appeals (R. 143) was entered on June 18, 1960 (R. 143). The petition for a writ of certiorari was timely filed on August 17, 1960, and

granted on June 19, 1961. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

Petitioner, a New York Daily News reporter, was convicted of contempt under 2 U.S.C. 192, fined, and sentenced to three months imprisonment for refusing to answer certain questions at a hearing of the Internal Security Subcommittee of the Senate Judiciary Committee.[1] The questions presented are:

1. Whether the indictment of petitioner under 2 U.S.C. 192 was invalid in view of its failure to state (a) the subject under inquiry[2] by the Subcommittee at the time of the alleged contempts, (b) the pertinency to that subject of the indictment questions and (c) the willfulness of petitioner's failure to answer the questions.

2. Whether the Government sustained its burden at the trial of showing the subject under inquiry when petitioner failed to answer the indictment questions and the pertinency to that subject of those questions; and whether, at the Subcommittee hearing, petitioner was adequately apprised thereof.

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[1] The Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary of the United States Senate, herein designated "the Subcommittee" or "the Internal Security Subcommittee".

[2] To distinguish the "question under inquiry", as that term is used in 2 U.S.C. 192, from the actual questions put to petitioner as to which contempts were charged (hereinafter sometimes "the indictment questions"), we use the term "subject under inquiry" or "subject of inquiry" in lieu of the statutory term "question under inquiry".

3. Whether the Government sustained its burden of showing probable cause for summoning petitioner as a witness before the Subcommittee and for subordinating his right of privacy to the public interest involved, if any.

4. Whether petitioner at the trial was denied the rights to a full and fair defense and of cross-examination, guaranteed to defendants in all criminal cases.

5. Whether Senate Resolution 366, 81st Cong., 2nd Sess., the charter of authority of the Subcommittee, is so vague as to invalidate the Subcommittee's power to compel testimony in the First Amendment area.

6. Whether an investigation into the "Communist Party strategy of placing its disciples in key positions in the fields of communications, newsgathering and reporting, education and other areas in which public opinion could be influenced" violated the freedoms guaranteed by the First Amendment.

7. Whether the Subcommittee, when it sat in this case, was a competent committee of the Senate within the purview of 2 U.S.C. 192.

8. Whether in this case, involving questions relating to Communist Party membership and affiliation, petitioner was improperly denied the right to show the bias of Federal Government employee jurors and, on such a showing, to have the indictment, returned by a grand jury composed in the majority of such Federal Government employees, dismissed.

Constitutional Provision, Statute and Resolution Involved

The following provisions of the Constitution are involved: Article I, sections 1 and 9, clause 3; Article III, section 1; and the First, Fifth, Sixth, Ninth and Tenth Amendments.

The following statutes are involved: 2 U.S.C. 192, as amended (R.S. Sec. 102, as amended Act of June 22, 1938, c. 594, 52 Stat. 942) and 2 U.S.C. 190b (Legislative Reorganization Act of 1946, August 2, 1946, c. 753, Title I, Sec. 133, 134(c), 60 Stat. 831 *seq.*). Senate Resolution 366, 81st Cong., 2d Sess., is also involved. These statutes and the Resolution are set forth in the Appendix, *infra*, pp. 46-48, *seq.*

Statement of the Case

Petitioner, a newspaper reporter employed by the New York Daily News, was convicted for contempt under 2 U.S.C. 192, for refusal to answer eight questions at a hearing of the Subcommittee held on January 5, 1956, in Washington, D.C. (R. 1-2). The hearing was one in a series titled "Strategy and Tactics of World Communism," scheduled purportedly because of testimony previously received by the Subcommittee, in June, 1955, from Winston M. Burdett, a radio commentator. Burdett had testified that in the late 1930's and early 1940's, while employed on the Brooklyn Eagle, he had become a member of the Communist Party, and he had named a number of persons as fellow-members.[3] Petitioner, however, was not one of the persons so named (R. 55).

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[3] See Hearings before Senate Internal Security Subcommittee, "Strategy and Tactics of World Communism", 84th Cong., 1st sess., Parts 14, 15 and 16.

In December, 1955, petitioner was summoned and questioned before an executive session of the Subcommittee in New York City (R. 55). He was then recalled to a public session of the Subcommittee, in Washington, D.C., on January 5, 1956, where he refused to answer eight of numerous questions put to him (R. 16-47).

Only three of the eight questions on their face related to inquiries into Communist activities (R. 1-2). The Count 1 question inquired whether petitioner was at the time of the hearing a member of the Communist Party; the Count 8 question, whether he had ever been a member; and the Count 2 question, whether he had ever attended "Communist meetings". The Count 3 question inquired whether petitioner then knew one "Marcella Hitschmannova", and the succeeding questions whether he had flown "a considerable mileage in Central America and Latin America"; whether he had flown "a privately owned airplane as distinguished from a military or naval airplane . . . as a private citizen . . . in Latin and South America . . . [with] another person with you for a good part of the time"; who had been "the person who accompanied you on that lengthy flight in Latin and Central America"; and when it had been that he had "made this lengthy trip to Latin and Central America" (R. 2).

The transcript of the Subcommittee hearing appears at R. 16-47. Shortly after the hearing began, when petitioner was asked whether he had been "a candidate for vice-president on the rank-and-file slate of the New York Newspaper Guild in 1949", he inquired "why this question is put" (R. 18). To which, J. G. Sourwine, the Subcommittee's chief counsel, replied, as follows (*ibid.*):

> "The question is put to qualify you as a person of whom we can ask questions with respect to the persons

who were on that slate and the manner in which that slate was supported."

Although petitioner thereafter repeatedly protested that the Subcommittee had no jurisdiction or power to question him as to his personal affairs and political beliefs and opinions, and insisted that no legislative purpose could be served by the questions put to him (see R. 19, 22, 23, 24-34, 35, 36, 38, 42), Subcommittee counsel Sourwine's reply quoted above was the only statement which even remotely indicated what the Subcommittee's inquiry was about.[4]

Petitioner was indicted for contempt on November 26, 1956.[5] Thereupon he moved to dismiss the indictment on

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[4] Sourwine's reply, of course, falls far short of that precise statement of subject under inquiry which *Watkins* v. *United States*, 354 U.S. 178, and other decisions of this Court require to sustain a conviction under 2 U.S.C. 192. Nor is there any proof that Subcommittee's counsel had the authority to define the subject under inquiry by the Subcommittee. In any event, none of the indictment questions is pertinent to the composition of the Newspaper Guild rank-and-file slate or the manner in which it was supported.

Other statements had been made by Senators Eastland and Hennings on January 4, 1956, the day before petitioner appeared. Hearings before the Subcommittee, "Strategy and Tactics of World Communism", 84th Cong., 2d sess., Part 17, pp. 1587, 1588. There was no showing, however, that petitioner had heard these statements or been apprised of them prior to his appearance (R. 57). And, as we hereafter demonstrate (Argument II, *infra*, pp. 20), these statements were so general and vague that they likewise failed to satisfy the requirements of *Watkins*.

[5] Eighteen witnesses were called in a series of Subcommittee Hearings held on January 4, 5 and 6, 1956. Their testimony appears in Hearings before the Subcommittee, "Strategy and Tactics of World Communism", 84th Cong., 2d sess., Part 17. Petitioners Shelton (No. 9) and Whitman (No. 10), as well as the present petitioner, were called as witnesses. Another witness called, Seymour Peck, also indicted for contempt, was acquitted by Judge Youngdahl, after trial in 1957, on the ground that the Subcommittee's inquiry was not sufficiently precise within the *Watkins* rule. See *United States* v. *Peck*, 154 F. Supp. 603 (D.D.C.).

the grounds, *inter alia*, (a) that the indictment was invalid for failure to allege the subject under inquiry by the Subcommittee at the time of the alleged contempts and the pertinency to that subject of the questions put to petitioner, and (b) that the indictment was void in that more than twelve members of the indicting grand jury were Federal Government employees and, because of the fear engendered by the Government's loyalty and security programs, actually prejudiced and biased against petitioner (R. 4-8). An affidavit of petitioner's counsel was filed in support of the charge of bias. Petitioner requested that if the indictment were not dismissed on that ground, a preliminary hearing should be held at which he might "offer proof, by examination of grand jurors and otherwise, that bias or prejudice existed on the part of more than twelve members of the grand jury who concurred in the indictment" (R. 7). The trial court denied the motion to dismiss and the alternative request for a hearing to examine into the bias of the grand jury (R. 8).

Prior to the trial, subpoenas were issued to the Subcommittee's chief counsel and to the Senate Clerk directing that they produce, among other things, all Subcommittee records relating to petitioner and minute books covering the series of investigations and hearings in the course of which petitioner had been summoned (R. 8-10). On the Government's motion, the trial court quashed these subpoenas (R. 48-49).

The case was tried by the court without a jury. The Government's chief and only material witness was Sourwine. He testified that although the Subcommittee "had no information directly placing . . . (petitioner) in the Communist Party" (R. 55), other information allegedly in the Subcommittee's files had caused it to summon petitioner (R. 51-55, 65). A substantial part of this information, Sour-

wine said, had come from a "confidential informant" (R. 52, 83, 93, 94).

Although the trial court permitted Sourwine thus to testify freely as to this information, it barred cross-examination as to its source and denied petitioner's request that he be permitted to inspect the data insofar as it was in writing (R. 82-83, 93, 94-95, 97, 99-100, 100-103). In view of these limitations on cross-examination, petitioner moved that Sourwine's testimony be stricken (R. 82-83, 113). The trial court, however, denied the motion to strike (R. 84, 113).

Sourwine's testimony as to the subject of the Subcommittee's inquiry was scant and in the most general of terms. He stated variously that the Subcommittee was seeking information in "several allied fields, all having to do with the activities of the Communist Party and its strategy and tactics" (R. 54); that the subject of the inquiry was "Strategy and Tactics of World Communism" (R. 62); and that the Subcommittee was interested in "the Communist conspiracy to overthrow the Government of the United States by force and violence" (R. 84-85).

This general testimony was consistent with the Government's view, that the subject of the inquiry here was coextensive with and no more specific than the scope of the total jurisdiction of the Subcommittee expressed in Senate Resolution 366 (R. 130-133, *passim*).

Petitioner's motion for a judgment of acquittal at the close of the Government's case was denied (R. 129-134).

Opening his case, petitioner vainly renewed his request for enforcement of the subpoenas previously issued (R. 134). Petitioner then made a proffer of proof, stating that the subpoenaed materials, if disclosed, would prove, *inter alia*, that the real purposes of the Subcommittee's inquiry

were to control and fix the standards of employment of newspaper reporters and to influence the character and content of newspaper reporting; that the Subcommittee also desired in its investigation of petitioner to harass him and to expose him to the contempt of the public and his associates; and that it was not acting with the least possible power in pursuance of any legislative function (R. 135-136).

At the conclusion of the trial, the court found that the Subcommittee was duly constituted and inquiring into matters within its authority and for legitimate legislative purposes, that the indictment questions were pertinent to the matter under inquiry, that petitioner had refused to answer them, and that petitioner had been properly informed by the subpoena of the purpose and reason for his summoning by the Subcommittee (R. 136-137). The trial court, however, did not specify the nature of the subject under inquiry by the Subcommittee. On these findings, the court held petitioner guilty on all counts of the indictment and, on April 12, 1957, entered its judgment and imposed a sentence of $500 fine and three months in prison (R. 137, 11).

Notice of appeal to the Court of Appeals was filed on April 12, 1957 (R. 12). On June 18, 1960, the Court of Appeals affirmed the conviction (R. 143). The opinion of the Court in this case is singular in that, in contrast to its opinions announced on the same day in companion cases of contempt, it was completely silent as to the subject under inquiry to which the indictment questions here were pertinent.

Summary of Argument

I

The indictment charged that petitioner had "unlawfully refused" to answer questions "pertinent to the question then under inquiry" before the Subcommittee. It did not state the subject of the inquiry which the Subcommittee was conducting, its authority to conduct that particular inquiry, the respects in which the questions set forth in the indictment were pertinent to the subject of inquiry and the fact that petitioner's refusal to answer was wilful.

The indictment is, therefore, insufficient in that it is couched in generic terms and likewise it fails to state the following essential elements of an offense under 2 U.S.C. 192: subject matter of the inquiry, Subcommittee authorization to conduct that inquiry, pertinency of the indictment questions to that subject matter, and the wilfulness of the refusal to answer the said questions. A statement of these elements was necessary in order to aid petitioner in addressing himself by motion to the sufficiency of the indictment and in order that he might adequately defend himself at the trial. The failure to draft a proper indictment deprived the defendant of his right under the Sixth Amendment "to be informed of the nature and cause of the accusation".

II

This Court has twice recently indicated the necessity that before a witness is subpoenaed a committee must have "probable cause or belief that he possessed [helpful] information" *Barenblatt* v. *United States*, 360 U.S. 109, 134, and *Wilkinson* v. *United States*, 365 U.S. 399, 412. No such

probable cause has been shown in the instant case. Indeed, the reasons for calling petitioner were a compound of irrelevancy, mistaken identity and interference with the right of petition.

III

The Government failed to show at the trial either the subject of the Subcommittee's inquiry or the pertinency of the indictment questions. In the course of the Subcommittee hearing, its counsel made only one statement concerning the subject under inquiry—that he was investigating a slate of officers in a Newspaper Guild election. At the trial, the Subcommittee counsel offered three subjects of inquiry: (a) Communist Party tactics and strategy, (b) "Strategy and Tactics of World Communism", and (c) "anything which affects or threatens the internal security of the United States" (R. 54, 61-62, 84). These varied statements certainly do not establish the subject under inquiry by the Subcommittee with sufficient preciseness to guide the Court in determining that matter as well as pertinency.

This absence of proof at the trial is distinct from the Subcommittee's failure to make subject matter and pertinency luminous to the witness at the time of the Subcommittee hearing. No elaborate explanation at the trial could make up this deficiency.

IV

Luminosity as to subject matter and pertinency at the time of the Subcommittee hearing is a condition to a conviction under 2 U.S.C. if a witness has challenged the Subcommittee's right to inquire. *Watkins* v. *United States*, 354 U.S. 178, 216-217. Such a challenge was made by the petitioner, courteously but firmly. Yet the Subcommittee ***admittedly*** (R. 113) did not respond with the requisite in-

formation. Therefore, since it cannot be said that "the subject matter has been made to appear with indisputable clarity" (354 U.S. at 214), petitioner was "not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment" 354 U.S. at 215.

V

The Government was required to establish the reasons which in its view constituted probable cause for the issuance of a subpoena to petitioner. It made such an attempt at the trial by testimony that the Subcommittee had received certain information concerning petitioner's activities and associations. Plainly, petitioner was entitled to test the veracity of the Government's witness and to determine whether or not such information existed and whether or not there was probable cause for subpoenaing petitioner. Nevertheless, the trial court quashed a subpoena issued to Subcommittee counsel directing the production of such information, rejected petitioner's request for an opportunity to examine it and barred reasonable cross-examination on these matters covered by the direct examination and clearly relevant to the issues of the case. This curtailment, an obstruction of petitioner's rights to engage in reasonable cross-examination and to make a full defense, violated his fundamental rights of a defendant in a criminal prosecution.

VI

Senate Resolution 366, the Subcommittee's charter, has not previously been passed upon by this Court. An examination of it will show that it is so vague as not to furnish a valid basis for a criminal prosecution. The Resolu-

tion does not come with the gloss of legislative history; this is the first known investigation of the press. The Resolution is even vaguer than that involved in the *Watkins* case since it comprehends "subversive activities" which are not limited to "movements seeking to overthrow the Government of the United States by force and violence." Since First Amendment rights are clearly involved, the defect of vagueness is compounded.

VII

The Subcommittee was admittedly engaged in an investigation of the press. (1) This appears from the record of the companion cases now before the Court as well as from the record herein. The first question addressed to petitioner related to his candidacy in a newspapermen's union (R. 15), a question significantly omitted from the indictment. (2) The Subcommittee claimed to be investigating "Strategy and Tactics of World Communism" (R. 62-64, 64-65), a term of considerable breadth and vagueness of contour. (3) The Section of Senate Resolution 366 under which it was proceeding related to "Subversive Activities", a term of equal breadth and obvious infringement upon First Amendment rights since it is *"not limited"* to criminal activities or to movements seeking the violent overthrow of the Government.

It is also significant that petitioner was apparently subpoenaed under the erroneous impression that he had signed a petition to the President of the United States on the subject of Smith Act prosecutions; that petitioner was asked concerning his background as a newspaperman; that his sworn denial as to ever having engaged in criminal activities (R. 44) was disregarded by the Subcommittee. All this confirms the view that the inquiry directed against him violated his rights under the First Amendment.

VIII

Petitioner could not lawfully be convicted of contempt under 2 U.S.C. 192 unless the Subcommittee was authorized to sit at the time of his hearing. *Christoffel* v. *United States*, 338 U.S. 84. The Legislative Reorganization Act of 1946, Sec. 134(c), prohibits committee meetings while the Senate is sitting, absent special leave. In the instant case, the Subcommittee sat without such special leave. It follows that it was not a tribunal competent to act as a Senate committee and particularly to compel a citizen to testify.

IX

Petitioner was indicted in 1956 by a grand jury in the District of Columbia, a majority of whose members were federal government employees. He made a preliminary motion to dismiss the motion upon an affidavit affirmatively showing actual bias and prejudice on the part of such jurors as a result of fear induced by the federal loyalty and security program. Alternatively, he moved for a hearing for the purpose of offering testimony to show such bias.

The denial of these motions violated petitioner's right to an impartial grand jury. This Court has not previously passed upon the validity of an indictment in a case of this type, claimed by the government to involve national security, where the government employees on the jury had been subject for more than a decade to the impact of the loyalty and security program. A realistic appraisal of the current scene in Washington requires recognition of the fact that the grand jury was subject to bias. In any event, there is no possible justification for not giving petitioner an opportunity to prove such bias. See *Dennis* v. *United States*, 339 U.S. 162.

ARGUMENT

I

The Indictment Was Insufficient Because It Failed to Set Forth Essential Elements of the Crime: Subject Matter of Inquiry, Pertinency, Wilfulness and Subcommittee Authority.

The indictment here alleged only that petitioner, as a witness before the Subcommittee, was asked questions "which were pertinent to the questions then under inquiry" and that he "unlawfully refused to answer those pertinent questions" (R. 1).

The indictment was therefore insufficient from two points of view: first, because it merely stated the offense in the generic term of the statute; second and more specifically, because it failed to set forth essential elements of the crime: the subject of the inquiry, the respect in which the questions were pertinent, that the refusal to answer was a wilful one and that the Subcommittee had authority to take testimony.

The first principle is set forth in the classic case of *United States* v. *Cruikshank*, 92 U.S. 542, 558, which holds that "it is not sufficient that the indictment shall charge the offense in the same generic term as in the definition; but it must state the species, it must descend to particulars". In that case, as well as in *United States* v. *Simmons*, 96 U.S. 360; *United States* v. *Hess*, 124 U.S. 483, this Court dismissed indictments for such defects, on the ground of the Sixth Amendment right of the defendants "to be informed of the nature and cause of the accusation".

For the sake of brevity and convenience, petitioner respectfully refers this Court to the able argument on this

point in petitioner's brief in *Russell* v. *United States*, No. 8, this Term.

Secondly, the indictment fails to state essential elements of the crime of contempt. 2 U.S.C. 192 makes it a crime for a person subpoenaed to give testimony "upon any matter under inquiry before . . . any committee of either House of Congress" to refuse to answer questions only as are "pertinent to the question under inquiry." In addition, it must appear that "such material or answers fall within the grant of authority actually made by Congress to the investigating committee." *United States* v. *Orman*, 207 F. 2d 148 at 153; *Bowers* v. *United States*, 202 F. 2d 447; *United States* v. *Rumely*, 197 F. 2d 166, 177, aff'd 345 U.S. 41. See, also, *McGrain* v. *Daugherty*, 273 U.S. 135; *Kilbourn* v. *Thompson*, 103 U.S. 168; *Quinn* v. *United States*, 349 U.S. 155.

Both (a) the subject of inquiry and (b) the committee's jurisdiction must be pleaded by the Government, since "[a]n indictment is required to set forth the elements of the offense sought to be charged." *United States* v. *Debrow*, 346 U.S. 374, 376; *United States* v. *Lattimore*, 215 F. 2d 847, 848, aff'd in part, 112 F. Supp. 507.

The proper way to state the subject of inquiry is to do just that: to state in the indictment what it was that the particular committee was investigating. This is the procedure which was followed by the grand jury which indicted Dr. Owen Lattimore. See *United States* v. *Lattimore*, 215 F. 2d 847 and 112 F. Supp. 507 (in which the indictment is fully set forth). It was the procedure also followed in *Sinclair* v. *United States*, 279 U.S. 263, 270.

There are two practical reasons why indictments for contempt of Congress must state in specific terms the subject under investigation. The first is a reason common to every indictment:

> " . . . The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances." *United States* v. *Cruikshank*, 92 U.S. 542, 558.

Secondly, and specifically with respect to contempt cases, the indictment must state the nature of the inquiry (which is a fact) in contradistinction to the allegation that it was within the committee's jurisdiction (which is a conclusion of law to be drawn by the court). How can a court decide a motion to dismiss the indictment on the ground that the inquiry was not within the committee's jurisdiction if it does not know the nature of the inquiry? How can it decide that the unanswered question is pertinent to a subject not disclosed to it?

In a well considered opinion, District Judge Bicks, in discussing the analogous problem in perjury cases involving materiality, said:

> ". . . it 'is undoubtedly necessary that it should appear on the face of the indictment that the false allegations were material in the matter in issue . . . [T]he facts set forth as falsely . . . sworn to should be sufficient in themselves to show such materiality.' *Markham* v. *United States*, 160 U.S. 319, 325. Such facts may 'not

be left to surmise or to be reached by way of inference or argument.' *Danaher* v. *United States*, 39 F. 2d 325, 327." *United States* v. *Laut*, 17 F.D.R. 31, 35 (S.D.N.Y.).

There are no countervailing considerations. Nothing is simpler than for the draftsman of an indictment to state what it was the committee was investigating. He must know it if he is to present any evidence—competent or hearsay—to the grand jury. The grand jury must know it, since the Fifth Amendment's guaranty against prosecution without indictment would be rendered meaningless. *Costello* v. *United States*, 350 U.S. 359, permitting indictments upon hearsay evidence, makes it all the more necessary for a defendant to be faced with a specific statement in the indictment of the facts constituting the offense.

The indictment in the present case, however, contains no specification of the subject under inquiry and sets forth no facts which would permit the courts to determine upon a motion to dismiss for insufficiency, what the subject was and whether the questions put to petitioner were pertinent to that subject. In a case determined by this Court, which involved this Subcommittee, it is significant that there was such diversity in the subject of the Subcommittee's inquiry as proved at the trial, this Court was unable to make a determination as to pertinency. *Sacher* v. *United States*, 356 U.S. 576.

Also fatal to the indictment here is its failure to state if that was a fact, that the principal Committee had authorized the Subcommittee to conduct the inquiry here involved. Senate Resolution 366 is a grant of authority to "the [Senate] Committee of the Judiciary or any duly authorized subcommittee thereof" (*infra*, p. 47). The indictment refers to the Resolution, but it nowhere alleges that there was

any authority vested in the Subcommittee here involved, nor does it set forth the basis for the Subcommittee's action in this case.

The reasons why this element, that of Subcommittee jurisdiction, must also be set forth with specificity in an indictment are spelled out in *United States* v. *Lamont,* 18 F.R.D. 27, where Judge Weinfeld dismissed an indictment in what the Court of Appeals described as a "scholarly opinion" (236 F. 2d 312). There, reviewing the historical function of the grand jury, Judge Weinfeld pointed out that an indictment stating all of the elements of a crime, including authority of the particular subcommittee, was necessary for two reasons: first, so that the defendant might be able to secure dismissal of an indictment which did not allege a crime and, second, so that the defendant might adequately defend himself at the trial.

The Court of Appeals, in an opinion by Chief Judge Clark, essentially agreed with Judge Weinfeld's reasoning and emphasized the fact that the issue was not merely procedural but went "to the very substance of whether or not any crime has been shown." The Court was particularly concerned that the indictment related to matters of a First Amendment character, citing, in particular *United States* v. *Rumely,* 345 U.S. 41, 44.

The defects in the indictment here are fundamental and could not have been cured by a bill of particulars. See *United States* v. *Kamin,* 135 F. Supp. 382, 136 F. Supp. 791 (D. Mass.). Even this remedy of a bill of particulars is, however, generally not available in the District Court of the District of Columbia, under the settled decisions there. *United States* v. *Flaxer* (C-1756-52), conviction reversed 358 U.S. 147; *United States* v. *Nathan* (C-163-57); *United States* v. *Grossman* (C-515-53); *United States* v. *O'Connor* (C-1650-53), conviction reversed 240 F. 2d 404 (App.

D. C.); *United States* v. *Sacher* (C-1216-55), conviction reversed 356 U.S. 576.

Finally, the indictment fails to allege that the refusal of the witness was a wilful one. This Court, in *Quinn* v. *United States,* 349 U.S. 155, 165, note 33, held that "Section 192, like the ordinary federal criminal statute required a criminal intent—in this instance, a deliberate intentional refusal to answer. This element of the offense like any other must be proved beyond a reasonable doubt." In the *Lamont* case, *supra,* Judge Weinfeld, dismissing the indictment stated: "Since wilfulness, or a deliberate, intentional refusal to answer is an essential element of the offense which the government must prove, it must also be pleaded in the indictment." 18 F.R.D. 27. This was not pleaded in the indictment in the present case.

II

The Subcommittee Violated Petitioner's Rights Under the Fourth and Fifth Amendments by Compelling Him to Appear and Testify Before It Without Probable Cause of Grounds to Believe That He Had Information Pertinent to Its Inquiry.

The record does not establish that the Subcommittee had a reasonable basis for subpoenaing petitioner in this case. Such a basis is required under this Court's decision in *Barenblatt* v. *United States,* 360 U.S. 109, 134, where the Court said that the issuance of a subpoena to Barenblatt was proper because, in part, it did not involve "indiscriminate dragnet procedures, lacking in probable cause or belief that he possessed information which might be helpful to the Subcommittee". More recently, in *Wilkinson* v. *United States,* 365 U.S. 399, 412, the Court reiterated this position.

In the instant case, according to Subcommittee counsel Sourwine, the Subcommittee had been impelled to subpoena petitioner by the following information the Subcommittee had:

(1) Petitioner had been a candidate for Vice-President of the New York Newspaper Guild in 1949 on a ticket which Subcommittee counsel charged, without any evidence, was "Communist-supported" (R. 51).

(2) He had "been the recipient of numerous visits" from a young woman employed by United Nations and again characterized, without the slightest evidentiary support, as "A courier for the Communist Party" (R. 52).

(3) Finally, "he had in 1941 signed a statement in defense of the Communist party which had been printed in the Daily Worker" (R. 53).

On the other hand, "the committee had no information directly placing Mr. Price in the Communist party" (R. 55).

It is submitted that none of the reasons advanced by the Government furnished a rational basis for the issuance of a subpoena to a private citizen. Open participation in the electoral processes of a union is no such justification. Association with a young woman, which is not shown by an iota of evidence to have been in the least improper, is equally no justification.

Most significant is the Subcommittee's interest in the so-called petition "in defense of" the Communist party. This Subcommittee, as well as the House Committee on Un-American Activities, as the records of both will show, have repeatedly regarded signature on such a petition as basis for examination of a citizen. In the instant case, attribution to petitioner of the signature on the particular petition appears to have been a case of mistaken identity,

since petitioner was not the William Price of Scottman, Pa. who apparently did sign (R. 104-105). This would appear then to be a case of mistaken identity not very different from that involved in *Shelton* v. *United States*, No. 9, this Term. But there is a more fundamental objection to sanctioning the issue of a subpoena by a Congressional Committee because one has signed a public statement of the kind involved. The petition involved turns out to be a sober and thoughtful request to the President of the United States not to continue the prosecution under the Smith Act. The signatories included such distinguished names as Professors Zechariah Chafee, Jr., W. Ernest Hocking, Max Lerner and Franz Boas (R. 105). To permit the Subcommittee to subpoena witnesses on the basis of signature to such a petition is not only a violation of the Fourth and Fifth Amendments, but of the First Amendment.

In the interest of brevity, we do not repeat, but adopt in full, the scholarly discussion of this point in Argument I of the brief for petitioner in *Shelton* v. *United States*, No. 9, this Term.

III

The Government at the Trial Failed to Show the Subject of the Subcommittee's Inquiry and to Establish the Pertinency of the Indictment Questions.

In a prosecution under 2 U.S.C. 192, the Government has the "duty at the trial to prove that the questions propounded by the congressional committee were in fact 'pertinent to the question under inquiry' by the committee", and the "first step in proving that component of the offense . . . [is] to show the subject of the subcommittee's inquiry" at the time the indictment questions were put to the witness. *Deutch* v. *United States*, 367 U.S. 456 (prelim. print), 81 S. Ct. 1587. Precise delineation of the subject under inquiry is essential not only to assure due process to the defendant

but also to enable to courts in a prosecution under 2 U.S.C. 192, to determine whether the indictment questions were in fact "pertinent to the question under inquiry" and a conviction in the particular case is justified. As Mr. Justice Frankfurter stated, concurring in *Watkins* v. *United States*, *supra*, 354 U.S. at 217:

> ". . . the scope of inquiry that a committee is authorized to pursue must be defined with sufficiently unambiguous clarity to safeguard a witness from the hazards of vagueness in the enforcement of the criminal processes against which the Due Process clause protects. The questions must be put with relevance and definiteness sufficient to enable the witness to know whether his refusal to answer may lead to conviction for criminal contempt and to enable both the trial and the appellate courts readily to determine whether the particular circumstances justified a finding of guilty."

The Government failed to make the necessary showing in this case.

The trial record in this case on the issue of pertinency consists of the transcript of the Subcommittee hearing and the testimony of Sourwine. Neither the transcript nor Sourwine's testimony supplies a satisfactory particularization of subject under inquiry. On the contrary, both exhibit such an utter disregard of the need for precision and such hopeless confusion as makes it impossible to adduce the subject of the Subcommittee's inquiry at the time, if indeed there was any.

As we have indicated (*supra*, p. 21), when, early in the hearing, petitioner was asked whether, in 1949, some seven years prior thereto, he had been a candidate on the rank-and-file slate of the National Newspaper Guild, he inquired "of the Subcommittee as to why this question is put" (R.

118). To which, Sourwine answered: "The question is put to qualify you as a person of whom we can ask questions with respect to the persons who were on that slate and the manner in which that slate was supported" (*Ibid.*). *This was the only statement made during the entire hearing relating to the subject under inquiry by the Subcommittee.*[6]

Sourwine's testimony at the trial is not only useless in delineating a subject of inquiry; it throws the issue into hopeless obscurity. In response to questions by the Government prosecutor and petitioner's counsel, Sourwine variously testified that the subject under inquiry at the time of petitioner's appearance was, as follows:

(a) "... The committee was seeking information in several allied fields, all having to do with the activities of the Communist Party and its strategy and tactics" (R. 54).

(b) The subject of inquiry was "Strategy and Tactics of World Communism" (R. 61-62).

(c) "The Internal Security Subcommittee ... is interested under its delegation of authority and imposition of duties from the Senate, in anything which affects or threatens the internal security of the United States. Certainly, the Communist conspiracy to overthrow the Government of the United States by force and violence is a major part of that inquiry" (R. 84-85).

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[6] Beyond the fact that this statement hardly constituted that precise definition of subject under inquiry necessary to a conviction under 2 U.S.C. 192, it was made not by the Subcommittee, but rather by Subcommittee counsel. There is no proof that the statement, inadequate as it was, was authorized by the Subcommittee or to have reflected a Subcommittee decision. Nor is there any suggestion that counsel had any authority to determine the nature of Subcommittee's investigations. In any event, none of the indictment questions were in any way pertinent to the composition of or support for the Newspaper Guild slate.

Reference was also made at the trial to the statements which Senator Eastland and Senator Hennings made at the commencement of the hearing on January 4, 1956, the day before petitioner appeared. As already noted, there was no showing that petitioner heard these statements or was apprised of them prior to his appearance (R. 57). The Government prosecutor thought petitioner was not in the hearing room at the time they were made; and Sourwine did not know (*Ibid.*). The statements, in any event, do not advance our search; for they obscure rather than clarify.

In his statement on January 4, 1956, Senator Eastland referred to the Burdett testimony, to which we have already adverted (*supra*, p. 4), and announced that the Subcommittee "was in duty bound to pursue every lead which developed out of the Burdett testimony". Hearings before the Subcommittee, "Strategy and Tactics of World Communism", 84th Cong., 2d sess., Part 17, p. 1587. Senator Hennings, on the other hand, stated that the Subcommittee was "interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency". *Id.* at 1588; R. 59.

Hardly had these statements been made, however, when Subcommittee counsel Sourwine expressly disclaimed that "Communist infiltration into the field of communications" was the subject of the hearings.[7] Later in the same day, Sourwine defined the subject under inquiry in the same broad terms as those on which the Government insisted during the trial of this case: "The subject matter of the

[7] The first witness called on January 4, 1956, James S. Glaser, noted the New York Times had reported that the "announced reason for this hearing was an intent to investigate Communist infiltration of the press and other forms of communication"; whereupon Sourwine declared: "For your information, the committee has made no such announcement. It is not accurate." (Hearings, *supra* at 1616).

committee's inquiry is Communist activity and the committee is proceeding on the basis of previous testimony and information furnished to it with respect to Communist activity" (*Id.* at 1652).

This is the sum of the statements made prior to and at the hearing which relate to the subject of inquiry. At the trial, both the Government prosecutor and the Subcommittee counsel Sourwine conceded that these statements do not furnish a definition of subject under inquiry within whose frame the issue of pertinency can be resolved.

Mr. Hitz, the prosecutor, firmly took the position that the inquiry in which the Subcommittee was here engaged was coextensive with and no more specific than the broad powers enunciated in its enabling resolution, Senate Resolution 366 (R. 130-133, *passim*). It was his view that the purpose of the Subcommittee's investigation in this case, as in all cases, was "to locate Communists wherever found" to "route out Communists and locate them wherever they are" (R. 133). He suggested no other or more precise formulation for the subject under inquiry nor did Sourwine.

The trial court apparently shared the Government's view and on that basis concluded that the Subcommittee was engaged in a legislative purpose and that the indictment questions were pertinent (R. 136). The Court of Appeals, affirming the conviction, did not trouble even to suggest what was the subject to which it found the indictment questions pertinent. In this respect, the opinion below in this case is markedly different from the opinion handed down by the Court on the same day in the common contempt cases; this is the only opinion in which the Court of Appeals fails to point to a particular subject under inquiry.

What we are unfavorably led to is the conclusion that the frame of reference on which the Government relied for

proof of pertinency in this case was Resolution 366 and that alone. Consequently, unless it affords a definition of subject under inquiry adequately precise to satisfy the requirements for conviction under 2 U.S.C. 192, the conviction of petitioner cannot stand.

Senate Resolution 366, however, offers no greater enlightenment as to the subject under inquiry by the Subcommittee in this case than did the Charter governing the House Committee on Un-American Activities in *Watkins, supra.* The futility of reliance on Resolution 366 for definition of the subject of inquiry in this case has been demonstrated in petitioner's brief filed by counsel here in *Liveright* v. *United States,* No. 11, this Term. We adopt and respectfully refer the Court to the argument in that brief (pp. 16-31).

Here again, the Subcommittee hearing involved and the trial of petitioner both antedated this Court's decisions in *Watkins* and *Barenblatt, supra.* Not having the guidance of the Court articulated in those decisions, neither the Subcommittee nor the trial court deemed it necessary that a specific subject of inquiry be established or shown to sustain conviction under 2 U.S.C. 192. The failure of the Court of Appeals to delineate such a particular subject in its opinion, rendered after *Watkins* and *Barenblatt,* can be explained only by the fact that the record in this case obviously permits no such delineation.

The Government having failed at the trial to show the subject under inquiry at the time the petitioner testified before the Subcommittee and the trial court having failed to find a particular subject under inquiry, the conviction of petitioner must be reversed.

IV

Neither the Subject Matter of the Inquiry Nor the Pertinency of the Questions Was Made "Luminous" to the Petitioner at the Time of the Subcommittee Hearing.

This Court has stated unanimously in *Watkins, supra,* that the subject matter and pertinency of the questions must be brought home to the witness with clarity at the time when he appears at the Subcommittee hearing. It is not enough that the Government should make up for an earlier default by clarifying these matters at the time of the criminal trial. *Cf. Deutch* v. *United States,* 367 U.S. 456. This is the requirement of the due process clause, as well as of the Sixth Amendment, requiring that a defendant "be informed of the nature and cause of the accusation".

The instant case is one in which the very admissions of the committee counsel at the trial are sufficient to establish absence of luminosity at the time of the subcommittee hearing. It will be noted first that this is not one of those hearings in which the committee began by reading a statement of purpose to the witness. Instead, it proceeded immediately to examine him (R. 16) and the very first question involved an association—trade union in this case—as follows:

> "Q. You were a candidate for Vice President on the rank and file slate on the New York Newspaper Guild in 1949?" (R. 18).

The petitioner stated:

> "I would like to make an inquiry of the committee as to why this question is put."

The committee's answer, through its counsel, was:

> "The question is put to qualify you as a person of whom we can ask questions with respect to the persons who are on that slate and the manner in which that slate was supported." (*Ibid.*)

This is a most significant answer because, aside from its essential ambiguity, it related to a non-indictment question and has nothing whatsoever to do with the questions set forth in the indictment (R. 1-2). The question that therefore arises is: Did the committee ever give any explanation to the petitioner when the indictment questions were put to him? The answer was given by Mr. Sourwine, subcommittee counsel at the trial:

> *"I don't think there was any other statement avowedly for that purpose."* (R. 113).

We submit that this is an unequivocal admission by the Government of the lack of luminosity at the time of the committee hearing.

It only remains to consider whether the Government is correct in its claim that it had no obligation to make subject matter and pertinency luminous because petitioner did not challenge it at the time of the committee hearing. As to this, the record is perfectly clear: Petitioner challenged in the most unequivocal terms the powers and jurisdiction of the committee (R. 19); he asserted his rights under the First Amendment (R. 19); he denied the existence of a legislative purpose (R. 23); and he incorporated all the prior grounds which he had stated in executive session (R. 22). The only defense which he surrendered was that of his constitutional privilege against self-incrimination under the Fifth Amendment. The Subcommittee was interested only in that surrender concerning which it had repeatedly inquired.

V

Petitioner Was Unduly Restricted in His Right of Cross-Examination at the Trial.

In prosecutions under 2 U.S.C. 192, "the court must accord to the defendants every right which is guaranteed to defendants in all other criminal cases". *Watkins* v. *United States*, 354 U.S. 178, 208; *Deutch* v. *United States, supra*, 81 S. Ct. at 1595. One of those rights, fundamental to a fair trial, is the right to submit the Government's witnesses to reasonable cross-examination. *Alford* v. *United States*, 282 U.S. 687; see *Reilly* v. *Pinkus*, 338 U.S. 269, 275-276. That right was denied petitioner on the trial of this case.

As we have indicated (*supra*, pp. 7, 8), Government witness Sourwine testified on direct examination that the Subcommittee had subpoenaed petitioner as a witness because it had received certain information concerning his activities and associations (R. 51-55).[8] This information, to whose existence he attested, was, according to Sourwine, both oral and written (see R. 93-95, 98, 99-100). When, however, petitioner sought to inspect the written material, the trial court barred him from doing so. And when petitioner endeavored to cross-examine as to the source of the information, the trial court firmly cut off all examination (*Ibid.*).

Before the trial, petitioner had secured the issuance of a subpoena directing the chief counsel of the Subcommittee to produce, *inter alia*, all written information in its files relating to petitioner (R. 8-10). On the Government's motion, the trial court quashed this subpoena (R. 48-49).

[8] As previously noted, however, Sourwine conceded that the Subcommittee "had no information directly placing . . . (petitioner) in the Communist Party" (R. 55).

Petitioner's request that Sourwine be directed to submit for petitioner's examination all "written memoranda, letters or other documents" of which he had testified was likewise denied (R. 83, 97).

Denied access to the Subcommittee's information, petitioner could not hope effectively to cross-examine the Government's witness. Nevertheless, he did try at least to ascertain the nature of the various items of information on which, as Sourwine testified, the Subcommittee had relied and the sources of such information (R. 83, 93-95, 98, 99-100). All to no avail. For, on the Government's repeated objections, the trial court consistently denied petitioner the right to engage in such cross-examination (*Ibid.*).

The testimony on which petitioner was thus denied opportunity to cross-examine was most material. This Court has made it clear that no person's appearance as a witness before a congressional committee, at least where his First Amendment rights are concerned, may "follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful" to the committee. *Barenblatt* v. *United States, supra,* 360 U.S. at 134. Proof of "probable cause" is relevant also to the judicial process of balancing the interest of the individual witness in his privacy and silence against the interest of the public in his testimony.

This is not a case such as *Barenblatt, supra,* where prior testimony had been received by the committee of the witness' participation in Communist Party activities, thus supplying probable cause for his interrogation. See 360 U.S. at 115. Not only had no such prior testimony been received as to petitioner here, but the Subcommittee had no information whatever "directly placing . . . [him] in the Communist Party" (R. 55). Only the information of which Sourwine testified at the trial could furnish basis for summoning petitioner.

No reason appears why Sourwine should have been accorded a higher status than that generally accorded Government witnesses in criminal prosecutions, why his testimony should have been deemed sacrosanct. Yet, the trial court would not permit petitioner to cross-examine to find out where the purported information had come from, whether Sourwine and his "informants" were credible witnesses, or, indeed, whether the information really did exist at all. So far as we know, it all may have been the product of a fertile imagination. The trial court, nevertheless, accepted it and required that petitioner be bound by it without question. Coupled with the quashing of the subpoena which had sought production of the Subcommittee's records, this meant a complete bar to any inquiry into the supposed basis for the subpoenaing of petitioner and the Subcommittee's urgent need to pry into his private affairs.

The Government's insistence that the information and its sources were confidential does not, of course, justify this drastic curtailment of cross-examination. In a criminal prosecution, the fundamental right of cross-examination surmounts the so-called informer's privilege of the Government. *Roviaro* v. *United States*, 353 U.S. 53; *Jencks* v. *United States*, 353 U.S. 657; *United States* v. *Andolschek*, 142 F. 2d 503 (C.A. 2). As this Court said in *United States* v. *Reynolds*, 345 U.S. 1, 12, and reiterated in *Jencks, supra*, 353 U.S. at 671, "... since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense ...". And, as Judge Learned Hand said, in *Andolschek, supra*, 142 F. 2d at 506:

> "... the prosecution necessarily ends any confidential character the [Government] documents may pos-

> sess; it must be conducted in the open and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bear directly upon the criminal transactions, and those which may be only indirectly relevant . . .".

In *Barenblatt, supra,* the Court assumed the difficult function of balancing the "competing private and public interests at stake" in cases like the present one, recognizing how vital it was that a proper balance be struck lest a witness' constitutional liberties be unjustly invaded. The task is a delicate one, and the " 'subordinating interest of the State must be compelling' in order to overcome the individual constitutional rights at stake". 360 U.S. at 126-127.

If, however, the accused witness be thwarted, as was petitioner in this case, from inquiring into the truth or, indeed, the existence of the testimony offered in support of the "subordinating interest of the State" and from demonstrating (by showing that there was no cogent reason for compelling his attendance before the committee) that the committee inquiry was not in aid of any vital national interest, there can be no fair balancing of the conflicting "private and public interests at stake". If, as in this case, the First Amendment rights of the individual are to be subordinated merely on the *ipse dixit* of a Congressional committee's counsel, the individual's rights will inevitably yield to any committee's self-serving avowal of the legitimacy and *bona fides* of its investigation.

Petitioner was here denied the right to that effective cross-examination which is guaranteed the defendant in

every criminal case. Petitioner's conviction must consequently be reversed.

VI

The Enabling Resolution of the Subcommittee is Unconstitutionally Vague.

Senate Resolution 366 (*infra*, pp. 47, 48), which constitutes the charter on which the Subcommittee relied in this case, treated in conjunction with 2 U.S.C. 192, must be read as a criminal statute. *Sacher* v. *United States*, 356 U.S. 576, 577. To be valid, it must establish a standard of conduct that is not so vague and indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application". *Connally* v. *General Construction Company*, 269 U.S. 385 at 391. Vagueness is especially pernicious where, as here, First Amendment rights are involved. *Burstyn* v. *Wilson*, 343 U.S. 495.

In both *Watkins* and *Barenblatt, supra*, this Court had occasion to consider the issue of vagueness of the similar charter governing the House Committee on Un-American Activities. In *Watkins*, the Court said: "It would be difficult to imagine a less explicit authorizing resolution" 354 U.S. at 202. In *Barenblatt*, the Court, considering the charter in the context of an investigation of Communist infiltration in education, found it necessary to look to the legislative history of the charter in order to give it an ascertainable meaning. It referred to debates on the original authorizing resolution in the 75th Congress, to seventeen House reports from the 76th Congress to the 85th Congress, and to twenty-three House Resolutions over the same period. This legislative history, the Court held, impelled the conclusion that the Committee possessed "legislative authority to conduct the inquiry presently under consideration . . ." 360 U.S. at 122.

Unlike the situation in *Barenblatt*, this Court has never passed upon the validity of the Resolution here involved. In the only two cases involving this Subcommittee, the convictions were reversed. *Flaxer* v. *United States*, 358 U.S. 147; and *Sacher* v. *United States*, 356 U.S. 576, both decided on other grounds.

However, in *United States* v. *Peck*, 154 F. Supp. 603 (D.D.C.), Judge Youngdahl squarely decided that the very Resolution involved in this case was too vague to comport with due process. We adopt the reasoning in that case.

Senate Resolution 366 authorizes the investigation of three subjects; two of them relate to the study of internal security laws, the third to investigation of "subversive activities", not defined except in that they are "not limited to . . . movement[s] seeking to overthrow the Government of the United States by force and violence." As Judge Youngdahl said, "No indication is given as to what else is deemed subversive, nor is the court aware of a satisfactory definition." 154 F. Supp. at 609.

The Senate Resolution is far more imprecise than the House charter criticized in *Watkins* but upheld in *Barenblatt*. The House resolution, said the Court in the latter case, "comes to us with a 'persuasive gloss of legislative history', *United States* v. *Witkovich*, 353 U.S. 194, 199, which shows beyond doubt that in pursuance of its legislative concerns in the domain of 'national security' the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country" 360 U.S. at 118. The Court held that in the light of the House Committee's prior investigation of Communist activities in education, sanctioned by the House *prior* to the hearing in *Barenblatt*, that subject was embraced by the resolution (360 U.S. at 121-123). In the

instant case, however, we do not have a comparable legislative gloss. The Government has yet to show that the Senate had ever approved investigations into communications media before petitioner here was subpoenaed.

Furthermore, *Barenblatt* approved the House Committee's charter on the ground that it was directed against propaganda for the forcible overthrow of government. But in the instant case, the Senate has expressly provided that the "subversive activities" to be investigated are *not* limited to "movements seeking to overthrow the Government of the United States by force and violence." The Senate has thus given its Resolution 366 so great a breadth that quite aside from raising First Amendment problems, it makes the scope of authority unconstitutionally vague.

The Court touched upon this problem in *Sweezy* v. *New Hampshire*, 354 U.S. 234, where it reviewed a state contempt conviction under a state act defining a "subversive person" by reference of membership in certain organizations. The Court criticized the legislative failure to distinguish between adherence to an organization with knowledge of its purpose to overthrow the government by force and violence and mere membership, and said that New Hampshire was stamping citizens with a "stain of disloyalty" and "inhibiting . . . the flow of democratic expressions." The Senate Resolution is even vaguer since it does not even refer to organizations whose objective is directed against our institutions.

VII

The Subcommittee's Inquiry Was in Violation of Petitioner's Rights Under the First Amendment.

The subcommittee, by its own admission, was engaged at the time of petitioner's appearance in an investigation of the content of American newspapers. Such an investigation was a violation of the freedom of the press guaranteed by the First Amendment and not in furtherance of any proper legislative purpose. In addition, the questions addressed to petitioner related to political associations, likewise protected by the First Amendment. Further, the specific section of the subcommittee's charter under which it was apparently proceeding is directed against activities in a form requiring the most subjective of determinations and thereby was also infringing upon freedom of association. Finally, the claimed subject matter of the inquiry, namely, "Strategy and Tactics of World Communism", was equally so broad as to interfere with the right of association and communication.

Although the nature of the inquiry was never revealed to petitioner, the subcommittee, both prior to his appearance and subsequent thereto, made it quite plain that it was then engaged in an investigation directly affecting the freedom of the press. Thus, it was made quite clear that the subcommittee was launched on a project which could have no conceivably proper legislative purpose, but rather one blatantly in violation of the First Amendment proscription against governmental interference with a free press.

The presence of such frank and unequivocal declarations of purpose by the subcommittee distinguishes this case (and its companion cases) from any other which has ever come before this Court. On January 4, 1956, the day before

petitioner appeared and testified, Senator Eastland, the chairman of the subcommittee, referring to the testimony of a previous newspaperman witness who had named persons he knew as members of the Communist Party and speaking as to the purpose of the inquiry, said (59):

> "The subcommittee could not be unmindful of the fact that among the persons involved in this investigation have been many who were or are members of the press, and that the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration . . ."

Immediately following that statement, another member of the subcommittee, Senator Hennings, added (emphasis supplied):

> ". . . I do believe it is very important at the outset for us to make it abundantly clear . . . that this is in no sense an attack upon the free press of the United States.
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> • • • • •
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> ". . . it should be clear that *the best evidence of any subversion or infiltration into any news-dispensing agency or opinion-forming journal is certainly the product itself.*
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> • • • • •
>
> ". . . Of course, *the committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency.*
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>
> ". . . But I would like . . . that it be generally known and understood that this is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show

> such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, *to influence or subvert the American press.*"

As to which, the chairman repeatedly noted his agreement (*ibid.*), commending Senator Hennings' statement as "a very fine and very accurate statement, one with which the Chair certainly agrees, in its entirety" (Tr. 59).

Early in 1957, the subcommittee reported to its parent Committee on the Judiciary with respect to this very investigation in the course of which petitioner was called as a witness (Sen. Rep. 131, 84th Cong., 2d Sess. (Gov't Ex. No. 11)). In the course of that report, the subcommittee stated that it had "encountered considerable evidence of Communist activities in the press, radio, television, and in political matters" (*id.* 95), stating, in part, as follows:

> "... Communists have made vigorous and sustained efforts to infiltrate the American press and radio and to entrench their members in all other forms of mass communications, where, *by emphasis or omission of the written or spoken word, it may be turned to the advantage of the conspiracy*" (*ibid.*, emphasis supplied).

During the course of this report, the subcommittee referred to its interrogation of petitioner, who, as it noted, at the time of his testimony, "was a reporter on the New York Daily News" (*id.* 102). Coupled with that reference were similar references to the other newspaper employees it had summoned and interrogated during the course of this investigation. And the subcommittee thereupon concluded:

> "Communists have infiltrated mass communications media in the United States, and efforts to increase such infiltration continue." (*id.* 117).

Thus, the subcommittee stands self-accused. By its own confession, it has divested itself of the many guises under which it has heretofore sought to justify its investigations. It is here unequivocally declaring: "This was our objective in calling William Price, New York Daily News reporter, and the other newspaper men and women as witnesses:—We are concerned about the people who, by their newspaper writings, are influencing public opinion. We are dissatisfied with the way in which their writings are influencing public opinion. We are investigating what they write and why they write as they do."

As Mr. Walter Lippmann observed, at the very time petitioner and his fellow-newspapermen were being questioned: "Does Congress have the right to investigate the press; and if it has, what if any are the limits of that power? . . . In what former generation, if ever before, in our history has the Government claimed the power to examine and pass judgment upon who shall work on newspapers? . . . Once it is the accepted principle that Congress has power to set up standards of newspaper employment, the inner spirit and the practical meaning of the First Amendment will be deeply impaired." N. Y. Herald Tribune, Jan. 10, 1956.

Clearly, this investigation could have had no conceivably proper legislative purpose. Assuming the subcommittee had disclosed that a disproportionate number of Communist Party members had succeeded in securing newspaper employment, the Congress obviously could not constitutionally bar such members from such employment. Nor could it constitutionally enact a law regulating the content of journalistic writings or establishing a system of censorship, direct or indirect, with respect to such writings.

Although it refused to disclose the nature of its inquiry to petitioner, to whom due process required such disclosure,

it has now revealed the purpose of that inquiry to the public and to the courts. That purpose, so plainly revealed, is ostensibly beyond constitutional limitations. As this Court said, in *United States* v. *Rumely*, 345 U.S. 41:

> "Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment. In light of the opinion of Prettyman, J., below and of some of the views expressed here, it would not be seemly to maintain that these doubts are fanciful or factitious . . . Whenever constitutional limits upon the investigative power of Congress have to be drawn . . ., it ought only to be done after Congress had demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits. Experience admonishes us to tread warily in this domain . . ."

It is true that the subcommittee claimed to be investigating "Strategy and Tactics of World Communism" (R. 62-64, 64-65), but this, in itself, is a phrase of unlimited breadth and, therefore, of particular danger to First Amendment rights. It would be a work of supererogation for counsel to remind this Court of what this subcommittee and its sister subcommittee in the House of Representatives has regarded in the past as included in the term "Communism". Suffice it to say that many of our greatest liberal scholars and many of the best movements for human welfare have come under the proscription of these subcommittees.

It is particularly significant that the section of Senate Resolution 366 under which the subcommittee was apparently proceeding related not to the administration of the Internal Security Act of 1950, not to laws relating to espionage, sabotage and the like, but to "the extent, nature and effects of subversive activities". This is particularly significant because the same section provides that the subversive activities are:

> "... not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

The opinions of this Court have previously considered similar language in *Sweezy* v. *State of New Hampshire*, 354 U.S. 234, 236, 246, 247, 253, 254.

Finally, it is significant that the petitioner was subpoenaed because he had signed a petition to the President of the United States on the subject of prosecution under the Smith Act. 54 Stat. 670. That this was an erroneous impression of the subcommittee does not mitigate its evident purpose in interfering with the exercise of a First Amendment right. Equally important in determining the impact upon the First Amendment is the inquiry of the petitioner concerning his background as a newspaperman.

It is true that many of the questions set forth in the indictment do not relate to the subject of communications. That, however, does not mitigate the subcommittee's purpose, as expressed by it, to investigate the field of communications. On the contrary, it reinforces the fact that this was a roving inquiry in which the subcommittee made various excursions to subjects outside the claimed scope of

its inquiry into the press. *Cf. Sacher* v. *United States*, 356 U.S. 576. As to these, quite aside from their irrelevancy, we call the Court's attention to the unequivocal denial by the petitioner that he had engaged in criminal activities sought to be imputed to him (R. 44).

VIII

The Tribunal Before Which Petitioner Allegedly Committed the Contempts Charged Was Not a Competent Committee of the Congress.

The provisions of 2 U.S.C. 192 contemplated a tribunal duly authorized to sit as a committee in the Congress at the time the contempts charged were committed. For a "tribunal that is not competent is no tribunal and it is unthinkable that such a body could be the instrument of criminal conviction." *Christoffel* v. *United States*, 338 U.S. 84, 90. The Subcommittee in this case, however, was not duly authorized and competent to sit as a committee, as it purported to do, when petitioner allegedly committed the contempts for which he was convicted.

The Subcommittee was governed in its operations by the provisions of the Legislative Reorganization Act of 1946 (Aug. 2, 1946, c. 753, Tit. I, sec. 134(c), 60 Stat. 832, 2 U.S.C. 1190(b). The indictment explicitly alleges that the Subcommittee was then conducting hearings "pursuant to the Legislative Reorganization Act of 1946" (R. 1). Section 134(c) of that Act provides as follows:

> "No standing commitee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session."

It was stipulated at the trial, however, that:

(1) When petitioner appeared before the Subcommittee, on January 5, 1956, the Senate was in session (R. 111-112); and

(2) no leave was granted by the Senate for the Subcommittee to sit at that time (*Ibid.*).

Consequently, it is clear that, at the time of the petitioner's alleged contempts, the Subcommittee was sitting in violation of the controlling statutory restriction. In short, the Subcommittee was not then a tribunal competent to act as a committee of the Senate.

That the rule articulated in Section 134(c) of the 1946 Act is one available to petitioner as a defense to the prosecution here is demonstrated in the brief for petitioner in Argument VI, *Liveright* v. *United States*, No. 11, this Term, presented by the counsel here. We incorporate the argument there and respectfully refer the Court to that brief.

IX

The Indictment Was Invalid Because a Majority of the Grand Jurors Were Government Employees.

Petitioner was indicted on November 26, 1956 by a Grand Jury in the District of Columbia, a majority of whose members were Federal Government employees. Petitioner made a motion to dismiss the indictment and, alternatively, for a hearing in which to offer testimony to show bias on the part of the jurors. This motion was supported by an affidavit of counsel showing the fear engendered in Federal employees by the Government's loyalty and security programs. This motion, which was denied, was similar to that made by petitioner in *Liveright* v. *United States*, No. 11, this Term.

For purposes of this brief, we adopt and respectfully refer the Court to the argument made by petitioner *Liveright* in Point VII of his brief.

Conclusion

We submit that the indictment, trial and conviction of petitioner were in violation of his statutory and constitutional rights. For the reasons set forth above, the order of affirmance should be reversed, the judgment of conviction vacated and the indictment dismissed.

Respectfully submitted,

LEONARD B. BOUDIN
25 Broad Street
New York 4, N. Y.

HARRY I. RAND
1501 Broadway
New York 36, N. Y.

Attorneys for Petitioner

Appendix

(Statutory Provisions Involved)

2 U. S. C. 192 (R. S. 102, as amended Act of June 22, 1938, c. 594, 52 Stat. 942) reads, as follows:

"Refusal of witness to testify

"Every person who having been summoned as a witness by the authority of either House or Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

2 U. S. C. 190b (Legislative Reorganization Act of 1946, August 2, 1946, c. 753 Title I, § 134 (c), 60 Stat. 832) reads, in pertinent part, as follows

"Authority of Senate standing committees and subcommittees; sitting while Senate or House in session

* * *

"(b) No standing committee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session."

(Senate Resolution Involved)

Senate Resolution 366, 81st Cong. 2d Sess., reads as follows:

"Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and

"Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and

"Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and

"Whereas it is vital to the internal security of the United States that the Congress maintains a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and

the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."